16-3-94

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 132.

FRANCIS E. PRAY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 31, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 132.

FRANCIS E. PRAY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition filed December 7, 1877	1	1
Traverse	3	2
Plea of limitation	4	2
Findings of fact and conclusion of law	5	2
Opinion of the court	6	3
Final judgment	8	5
Appeal	9	5
Certificate	10	5

1 Court of Claims of the United States. December term, 1877.

FRANCIS E. PRAY
against
THE UNITED STATES. } No. 11843.

I. *Petition.—Filed Dec.* 7, 1877.—J. R.

To the honorable the judges of the Court of Claims of the United States:

Respectfully shows your petitioner, Francis E. Pray, of Portland, in the State of Maine, as follows:

That on the first day of September, 1864, having been before that time duly appointed, he entered upon the duties of the office of an occasional weigher and gauger in the customs of the United States at the port of said Portland, and held said office and was constantly employed therein from said date to the 30th day of November, 1877; that is to say, for the term of thirteen years and three months.

That the salary of said office, as prescribed by the statute of the United States, was from said September 1st, 1864, to July 31st, 1866, at the rate of fifteen hundred dollars per year, and from the first day of August, 1866, to the date of this petition, at the rate of two thousand dollars per year.

That your petitioner received said salary of fifteen hundred dollars from September 1st, 1864, to July 31st, 1866, and his salary of two thousand dollars from August 1st, 1866, to February 28, 1867, but that from and after said February 28, 1867, to November 30, 1877, that is to
2 say, for the period of ten years and nine months, he has received only at the rate of seventeen hundred and fifteen dollars per year, and that the rest of his lawful salary, that is to say, two hundred and eighty-five dollars each year, and at that rate for a part of a year, amounting in the whole to three thousand sixty-three $\frac{75}{100}$ dollars, has been unlawfully withheld from him, and is now owed and due to the petitioner from the United States, for which he seeks by this petition to obtain a judgment of this honorable court.

FRANCIS E. PRAY.

UNITED STATES OF AMERICA,
Maine District, ss:

On this 30th day of November, 1877, personally appeared before me Francis E. Pray, the within-named petitioner, and made oath that the statements in the within petition set forth are true; that he has made no assignment or transfer whatever of the claim therein made, or any part thereof, or any interest therein; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits or offsets, and that from the commencement to the close of the late rebellion he gave no aid or comfort to said rebellion, but consistently adhered to the Government of the United States.

Before me.

A. H. DAVIS,
Clerk Circuit Court United States.

THOMAS H. TALBOT, *Boston, Mass.*,
Attorney.

1330——1

3 II. *Traverse.—Filed April* 11, 1878.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

4 III. *Plea of limitation.—Filed April* 11, 1879.

Now come the defendants, by their Attorney-General, and say that the claimant herein should not further have or maintain his suit against the defendants for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

THOMAS SIMONS,
Ass't Att'y-General.

5 IV. *Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, find the facts to be as follows:

I.

From the 1st of March, 1867, to November 30, 1877, the claimant held the place and performed the duties of occasional weigher and measurer at the port of Portland, Me., under appointment of the collector of customs at that port, with the pprobation of the Sret-cary of the Treasury.

II.

In the words of his appointment his compensation was fixed "at $2,000 when employed."

III.

For all the time he held said place his compensation was paid to him at the rate of $2,000 per annum, except for Sundays, for which no compensation was paid him; nor did he during said time claim any compensation for those days; nor does it appear that on any Sunday during that time he performed any service as weigher or measurer.

IV.

The amount of his compensation for the Sundays which occurred during the period of his said service, computing his whole compensation at the rate of $2,000 per annum, would have been $3,061.83.

V.

For each month during the period of said service the claimant was paid his compensation upon bills made out in the following form:

"*The United States Dr. to F. E. Pray, occasional weigher of the customs for the port of Portland.*

"For my services as occasional weigher of the customs from to , inclusive, Sundays excepted, one month, at two thousand dollars per annum."

Each bill so made out was for the sum due for the month named in it after deducting the Sundays, and to each was subjoined a receipt, signed by the claimant, in the following form:

"Received payment for the above services, $ of, collector of customs for the port of Portland."

Upon the foregoing facts the conclusion of law is that the claimant's petition should be dismissed, upon the grounds set forth in the fol-
6 lowing opinion:

V. *Opinion of the court.*

DRAKE, Ch. J., delivered the opinion of the court:

By section 21 of the act of March 2, 1799, "to regulate the collection of duties on imports and tonnage" (1 Stat. L., 627), each collector of customs was authorized, "with the approbation of the principal officer of the Treasury Department, to employ proper persons as weighers, gaugers, measurers, and inspectors at the several ports within his district;" and that provision has ever since continued in existence, and is now contained in section 2621 of the Revised Statutes.

Its terms, in our judgment, authorize the collector, with the approbation of the Secretary of the Treasury, not only to employ persons for those positions, but to agree with them as to their compensation. Under it the claimant was employed, but not for a specified period, and he was to be paid the agreed compensation "when employed."

He claims that the words "when employed" mean the period of time in which he held the situation. The defendants contend that they mean the days he was actually employed in the discharge of the duties of the position.

Whatever room there may be for difference of opinion as to the meaning of those words, the claimant has precluded himself, by his own monthly acts during the whole period of his employment, from the benefit of the position he now assumes; for at the end of every month he rendered a bill

for his compensation for all the days of that month, "Sundays excepted," and never during that period intimated a claim that he was entitled to be paid for Sundays. This shows the construction he and the collector both put on the contract under which he served, and that construction precludes his recovery here of any compensation for the days he excepted from his bills.

To avoid this conclusion, he contends that he was entitled by express statute to a salary of $2,000 per annum; and he relies for this on a clause in section 4 of the act of July 28, 1866, "to fix the compensation of certain collectors of customs, and for other purposes" (14 Stat. L., 308), in these words:

"That in lieu of the compensation now allowed by law there shall hereafter be paid * * * to each of the custom-house weighers at the ports of Boston, Philadelphia, Baltimore, New Orleans, Portland, and San Francisco two thousand dollars per annum, out of the appropriation for expenses of collecting the revenue from customs."

This provision is now section 2739 of the Revised Statutes.

It does not, in our opinion, have the effect claimed for it, for the claimant was not appointed as a weigher, but as a "weigher and measurer," which is a different thing, at any rate in terms, from a "custom-house weigher." The difference between the two may not have been very great, but beyond doubt it existed, and the mere fact of its existence takes the case out of the act of 1866, which fixes an annual salary, and places it under the act of 1799, which left the compensation to be agreed upon between the collector, the Secretary of the Treasury, and the employee.

There is another view of the matter, which seems to show that this claimant was not by law entitled to a fixed annual salary of $2,000. Employed as "weigher and measurer," of course he could be required to perform the functions of measurer. If he was, as weigher, to receive $2,000 salary, what was he to be paid for his services as measurer? The statutes nowhere provided any salary for a measurer, nor did they authorize in terms the office of "weigher and measurer." How, then,
7 was the measurer to be paid? It seems to us only in one way, and that was under the contract of his employment in the double capacity of weigher and measurer, with a salary covering both capacities, the greater part of which might be earned by the weigher or the measurer, according to circumstances.

There is still another view which is adverse to the claimant's position. He was employed not only as "weigher and measurer," but as an "occasional weigher and measurer;" and every month he rendered a bill as "occasional weigher."

Here, then, both by the employing power and the employee, a word was used which certainly was not used without a purpose. The statute does not use it, but speaks of "custom-house weighers." Did the collector and the Secretary of the Treasury mean nothing by the use of the word "occasional?" Of course, they had a meaning; and it seems clear that they meant the claimant's position to be a different one from that which the act of 1866 meant by the words "custom-house weighers." And this purpose is further made evident by the use of the other words, "when employed." If the claimant was to be a weigher, within the meaning of the act of 1866, it is not supposable that either the collector or the Secretary of the Treasury would have attempted to cut down his statutory annual com-

pensation, by counting the days when he was not actually employed, and refusing him pay for those days; for those officers would have known, quite as well probably as we do, that there was no statute authorizing them so to razee an annual compensation fixed by law, and therefore that they could not do it.

It is no answer to this to say that the statute nowhere recognizes any such distinct grade of customs officers as "occasional weighers." True, it does not; but the collector had authority to employ temporary or occasional weighers, as well as regular or permanent ones; and he saw fit to employ the claimant as an occasional one; and the latter agreed to that employment, and no other; and he also agreed to the terms of his employment; and worked for ten years and eight months under that employment, and was regularly paid the compensation he agreed to receive for his services as an "occasional weigher and measurer." He cannot now be permitted to say that he was, in reality, something else than what his appointment indicated, and what he himself, through all that period, every month affirmed it to be.

The claimant's petition is dismissed.

8 VI. *Final judgment.*

At a court of claims held at the Capitol in the city of Washington, on the 14th day of April, A. D. 1879, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said petition of the claimant Francis E. Pray be dismissed.

9 VII. *Application for and allowance of appeal.*

From the judgment rendered in the above entitled cause on the 14th day of April, 1879, in favor of the defendants, the claimant, by his attorney, on this 26th day of June, 1879, makes application for and gives notice of an appeal to the Supreme Court of the United States.

GEO. F. TALBOT.

Filed June 28, 1879.

AT CHAMBERS.

Allowed.

C. D. DRAKE,
Chief Justice.

10 In the Court of Claims.

FRANCIS E. PRAY
vs.
THE UNITED STATES. } No. 11843.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above entitled cause; of the findings of fact by the court and the conclusion of law thereon; of the opinion of the court; of the final judgment; of the applica-

tion of claimant for allowance of appeal to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this twenty-fourth day of October, A. D. 1879.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 132. Francis E. Pray, appellant, vs. The United States. Court of Claims. Filed 31st October, 1879.

OFFICE SUPREME COURT U. S.
FILED
DEC 13 1882
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

October Term, 1882.

FRANCIS E. PRAY, Appellant,
v.
THE UNITED STATES.
No. 132.

BRIEF FOR THE APPELLANT.

Statement of Facts.

From March 1, 1867, to November 30, 1877, the appellant held the place, and performed the duties, of a weigher and measurer at the port of Portland, Me., under appointment of the collector of customs, with the approbation of the Secretary of the Treasury.

In the letter appointing him to that employment, he was designated as "an occasional weigher and measurer."

From the annual salary affixed by statute to his office, there was, in the payments made to him, deducted an amount equivalent to the *pro rata* compensation for all the Sundays in each year, or one-seventh of said salary; and for the sum thus withheld, to wit, $3,061.83, he brought this his petition, which the Court of Claims ordered to be dismissed.

Argument of Law.

I. The validity of an appointment in the customs service, made by the collector with the approval of the Secretary

of the Treasury, is derived from the laws of the United States. Such appointment could confer no place and impose no duties except as some statute had authorized.

Neither the collector nor the Secretary, acting separately or together, can create a new office or employment in the customs service, nor change the duties of any office already created. (Const. U. S., art. II., sec. 2, clause 2; U. S. *v.* Maurice, 2 Brooks, 96, 100.)

II. The only statute which, in 1867, authorized any such appointment as that received by this appellant, was chapter 22 of March 2, 1799, the twenty-first section of which did authorize the employment of "proper persons as weighers, gaugers, measurers, and inspectors." (1 Stat. at L., p. 642.)

(A) Long before the appointment of the appellant an act of Congress had expressly authorized one person to be appointed to two or more of these offices. (July 7, 1838, ch. 169, sec. 3, 5 Stat. L., p. 265.) There was, therefore, nothing irregular in the conjunction in his letter of appointment of the words "weigher" and "measurer."

(B) But the word "occasional," as used in that letter of appointment, is unknown to the statute under which the appointment was made. It can, therefore, have no effect to change the grade of the office, and must be disregarded as of no legal force.

(C) Perchance a meaning, not of legal effect, may be found for it. The fluctuations in the customs business necessitated, and the statute permitted, an occasional reduction of the number of customs weighers; and the purpose of the word was to designate the officer whose office was liable, in the exigency of the public service, to be terminated altogether. (See ch. 22, 1799, *ante*, and March 3, 1835; ch. 30, sec. 3, 4 Stat. L., 771; ch. 255, July 14, 1870, sec. 36, 16 Stat. L., p. 271.)

III. The appellant, then, was, as known to the law, (ch. 22, 1799,) employed as a weigher, who was also, under the law of 1838, doing the duty of a measurer. He was a customs weigher at the port of Portland, in Maine.

(D) The Treasury Regulations of 1874 recognize only weighers as customs officers. They do not know occasional weighers. (Treasury Reg. 1874, art. 1155.)

IV. The statute (ch. 22, 1799) did not regulate or authorize compensation.

(E) If, therein, compensation was authorized, it was authorized at the unlimited discretion of executive officers; and it has never been the policy of the government to leave at the discretion of such officers the fixing of public salaries.

V. The compensation of the customs officers authorized to be appointed by chapter 22, 1799, was, in fact, regulated by the next chapter, (1 Stat. at L., 627, ch. 23,) which the court below, by some singular inadvertence, seems wholly to have overlooked.

(F) Its title shows this purpose. It established the compensation of the officers—all of them—employed in the collection of duties on imports; and the appellant is found to have been so employed.

VI. Statutes relating to compensation, apart from those authorizing appointment and employment, had regulated the compensation of customs weighers from the time of the first creation of the office. But the rate of such compensation was changed, first, by the act of 1838, and later by that of July 18, 1866.

The last provided as follows:

"In lieu of the compensation now allowed by law, the customs weighers at the port of * * * Portland, in Maine, * * * shall receive a salary of two thousand dollars each." (14 Stat. L., 308.)

(G) By the statute of 1799—that is, chapter 23—weighers were allowed the fees, prescribed by the act itself, which they earned. The statute of 1838 restricted their pay, still predicated upon fees, to a maximum of $1,500. But the act of 1866 established a new policy altogether, and substituted for certain enumerated ports—Portland, Me., being one of them—a fixed annual salary for a compensation based on fees.

This policy was deliberately adopted for reasons.

VII. The compensation fixed by this statute was not a pay *per diem*. It was a *per annum* compensation. It was annual salary, $2,000 for the year. The law so reads as enacted and re-enacted. (14 Stat. L., 308; R. S., sec. 2739, p. 536.)

(H) Under this statute, the integer, the unit of service and of pay, was a year. The pay period was a year. A day had no significance, except as a part of a year. (Reeder's Case, 1 Court of Claims Rep., 141.)

(I) The practice of the Treasury in paying, so values a day. The Treasury Department understands this salary to be as above stated, as appears in the Treasury Register for 1873, 1874, 1875, 1876, and 1877.

Revised Statutes, section 1763, so understands the meaning of the word "salary."

VIII. Under this statute the appellant was entitled to receive the salary which is attached to his office—$2,000 a year—as long as he held the office of a customs weigher at the port of Portland, in Maine. (Patten's Case, 7 Court of Claims Rep., 362; Graham's Case, 1 Court of Claims Rep., 380; Ware's Case, 7 Id., 565; Sleigh's Case, 9 Id., 369; Claim of Major Harrod, 13 Opinions Attorneys-General, 103.)

(J) The statutes of 1799 and 1838 fixed the compensation of all customs weighers. There was no class of such officers whose compensation was not provided for, or which was left to the discretion of executive officers. The act of 1866, as it related to the enumerated ports, was equally wide in the scope of its intent and operation.

(K) Its enacting force was as unbounded as its repealing purpose. It fixed a compensation which was to be "in lieu of the compensation" previously allowed by law.

IX. In order that an officer may be entitled to the salary fixed by the act of July 18, 1866, that statute does not require, as a condition, that he shall be employed in the performance of his official duties on every, or on any, Sunday in the year.

(L) In terms it does not, in this respect, differ from other statutes which fix salaries; and its construction ought not to be different. The words, "if actually employed on all the Sundays," cannot be assumed to be a part of the statute. The statute has not been so administered at any other port, nor, with a single exception, with reference to any other officer.

X. On the other hand, the year of service which this statute requires as a consideration for the salary of $2,000, which it establishes, comprises merely a year of only six working days in each week, 313 days of actual, active employment.

(M) Not only was active service—in time—demanded of the officer, but skill was required; and liability and disabilities were imposed. (Act March 2, 1799, secs. 72 and 73, 1 Stat. L., 680; R. S., secs. 2636, 2638, pp. 525, 526.)

XI. This being the right secured to the officer by the statute—the statute itself constituting a contract between him and the government—it is hardly necessary to assert that no other party could alter it.

(N) The court below so understands. (See Transcript, p. 4, near the bottom, and top of p. 5.)

(O) The whole power, in the premises, of the collector, with the approval of the Secretary of the Treasury, was confined to appointing and removing. One was exercised before March 1, 1867, and the other on November 30, 1877. The law regulated all between; certainly the amount of salary.

XII. The collector, even with the approbation of the Secretary of the Treasury, had no authority to make with the appellant any contract that fixed for his services a compensation other than that established by law. (U. S. *v.* McCall, Gilpin, 563, 571.) No such contract was in fact made.

(P) The letter of appointment specified "$2,000 a year when employed;" that is, a year's salary for a year's employment. The case finds that the appellant was employed all the years intervening between February, 1867, and December, 1877. (Trans., p. 2, Finding I.)

(Q) It is not found that the appellant was not employed on Sunday. There is in the case no report of the surveyor to that effect. (Ch. 22, 1799, sec. 21, 1 Stat. L., p. 642.)

XIII. The monthly settlements of the appellant with the disbursing officer do not constitute a new contract of compensation with the government, nor a waiver of any of the appellant's rights under the contract of the statute.

The disbursing officer was not only not authorized to bind the United States by such a contract: he was forbidden so to do by the statute which fixed the appellant's compensation. His whole duty was to pay the statute salary. (U. S. *v.* Dickson, 15 Peters, 141, 161.)

THOMAS H. TALBOT,
For the Appellant.

OFFICE SUPREME COURT U. S.
FILED
DEC 13 1882
JAMES H. McKENNEY, Clerk

UNITED STATES SUPREME COURT

OCTOBER TERM, 1882.

FRANCIS E. PRAY,
vs.
THE UNITED STATES. } No 132.

Brief for the United States.

The appellant sues for arrearages of "salary" as an "occasional weigher and measurer" in the custom-house at Portland, Maine, from 1st March, 1867, to 30th November, 1877, as the case appears in the finding of facts, although his pretensions are much broader in the petition.

As appears by the opinion of the Court (p. 3), the appellant was first appointed under § 21 of the act of 2d March, 1799 (1 Stats., 627), authorizing collectors to employ proper persons as weighers, gaugers, measurers, &c., with the approval of the head of the Treasury Department. The appointment was not for a specified period, and he was to be paid the agreed compensation "*when employed.*"

By the act of 28th July, 1866, § 4, (14 Stats., 308,) it is provided "that in lieu of the compensation now allowed by law there shall hereafter be paid * *

* to each of the custom-house weighers at the ports of Boston, Philadelphia, Baltimore, New Orleans, Portland, and San Francisco two thousand dollars per annum, out of the appropriation for expenses of collecting the revenue from customs," which section is now § 2739, R. S.

It is under this section that appellant claims compensation at the rate of $2,000 a year; in other words, that, like other salaried officers, he is entitled to full compensation, without regard to the actual time he was employed, and without abatement for non-secular days.

It is not pretended that appellant was appointed an employee, or continued in employment as such, with any particular reference to the act of July, 1866; on the contrary, he was employed all the time as "*occasional* weigher *and measurer*," and during the term embraced by his claim, as found by the Court, at a compensation of "$2,000 when employed." (Finding 2, p. 2.)

If his appointment had been made under the act of July, 1866, then his functions must necessarily have been restricted to those of *weigher*, but he was *both weigher and measurer*, and he describes himself in his petition as "weigher and *gauger*," which is, no doubt, a mistake, for "weigher and measurer." At any rate, he sets up no claim to compensation as *weigher only*, which, however, he must needs have done to bring himself under the act of July, 1866.

The question is, by what tenure or holding did he serve the Government. The answer is, that he held, not an office, but the employment of an "*occasional*

weigher and measurer," to be paid at a certain rate "*when employed.*" His position was *occasional,* and therefore not permanent, and being occasional, he was to be paid only for his *actual services,* that is, "when employed."

As the court below properly says, if the appellant was an officer under the act of July, 1866, it was as *weigher* only. What, then, was the rule or measure of his compensation as "measurer" *or* "*gauger,*" as he mistakenly denominates himself in his petition? Again, if he was a creature of the act of July, 1866, how came it that his functions were "occasional" under an act providing for permanent appointments?

As was held by the Court below, the power to appoint occasional weighers and measurers &c., under the Act of March, 1799, was not taken away by the Act of July, 1866.

But whether there was legal warrant or not for what was done, the case is one of a contract for services completely performed on both sides, and the appellant has no ground to claim anything beyond the terms of the contract between him and the collector.

If the collector had employed the appellant in *defiance* of law, on what pretense could he now bring himself *under the law*? The only ground he can stand on is *the contract* under which he was employed.

But upon the plainest principles of fair dealing the appellant is *estopped* to set up this claim for arrearages.